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No. 84-1437

In the Supreme Court of the United States

OCTOBER TERM, 1984

PETER V. ALEXANDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

15 pp

QUESTIONS PRESENTED

1. Whether the indictment was insufficiently specific.

2. Whether the admission of testimony concerning the significance of statistical data gathered by a party other than the witness was plain error.

3. Whether the court of appeals erred in ordering a hearing on only one of the *Brady* issues raised by petitioner.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 748 F.2d 185.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a-18a) was entered on October 22, 1984. A petition for rehearing was denied on December 11, 1984 (Pet. App. 19a-20a). On January 23, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 11, 1985 (Pet. App. 24a) and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 30 counts of mail fraud, in violation of 18 U.S.C.

1341 (Counts 1-26 and 28-31), five counts of submitting a false claim to an agency of the United States, in violation of 18 U.S.C. 287 (Counts 32-34, 36, and 38) and one count of making a materially false statement in connection with a state Medicaid program, in violation of 42 U.S.C. 1396h (Count 40). Petitioner was sentenced to concurrent 30-month terms of imprisonment and cumulative $500 fines on Counts 1 and 40, with imposition of sentence on all other counts suspended in favor of probation for five years following his release.

The evidence at trial showed that petitioner, a gynecologist, submitted fraudulent insurance claims to three major health insurers — the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Medicaid, and Blue Cross/Blue Shield — from May 15, 1978, through December 7, 1982. For example, a CHAMPUS auditor testified at trial that although petitioner submitted claims for performing thousands of medical tests on patients, petitioner's office records reflected the result of only one such test on one patient (Pet. App. 4a). Documentary evidence showed that petitioner claimed to have performed the same tests on all of his patients even though it is very unlikely that the same tests were warranted in all cases (*id.* at 5a). Petitioner's medical secretaries testified that petitioner discarded and never tested the urine samples he collected and that he was never seen performing microscopic analysis (*ibid.*). Four scientific experts (two obstetrician/gynecologists, one microbiologist, and one pathologist) examined petitioner's microscope and stated that they considered it inadequate to perform some of the tests petitioner claimed to have performed (C.A. App. 210-216, 238-239, 306-307, 313-315, 327-334). Petitioner's records recorded the blood pressure of patients as 120/60 in 90% of the records, a statistic that the experts considered very improbable because blood pressure normally varies from patient to patient

(C.A. App. 218, 234). There was evidence that petitioner claimed to have performed pregnancy tests on women who had been sterilized, a procedure that is rarely medically necessary (C.A. App. 217, 232). And petitioner submitted a claim for tests he did not perform on an undercover law enforcement officer who posed as a patient (C.A. App. 264-265, 496-499).

Petitioner obtained new counsel—the counsel now representing him—after his conviction. On appeal, petitioner raised a number of contentions, including a challenge to the sufficiency of the evidence, a claim that trial counsel was incompetent, and a claim that the government failed to produce requested exculpatory material as required by *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). The court of appeals found that the evidence was sufficient to support the convictions (Pet. App. 3a-8a). The court "express[ed] no opinion" on petitioner's claim that trial counsel was constitutionally ineffective, stating that "that claim is more properly considered in [petitioner's] pending motion in the district court for relief under 28 U.S.C. § 2255" (Pet. App. 9a). The court of appeals also remanded one aspect of petitioner's *Brady* and *Agurs* claim; it noted that the prosecutor had opened ~~its~~ his files to defense counsel before trial but ordered the district court to determine whether certain materials were in the files at the time (Pet. App. 9a-16a). All of petitioner's other contentions were rejected.

ARGUMENT

1. Petitioner's principal contention (Pet. 9-16) is that the indictment was insufficiently specific. Fed. R. Crim. P. 12(b)(2) provides that "[d]efenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction * * * or to charge an offense * * *)" must be raised before trial. Petitioner failed to raise his objection to the specificity of the indictment before trial;

the objection has therefore been waived. Fed. R. Crim. P. 12(f). Indeed, petitioner did not even raise this contention in his opening brief in the court of appeals,[1] and the court of appeals accordingly did not address it. That is an additional reason for this Court to deny review.

In any event, petitioner's contention is without merit. Paragraphs 24-27 of Count 1 of the indictment (Pet. App. 32a-33a), entitled "Scheme," specified the ways in which petitioner defrauded the insurers—for example, by "submitt[ing] duplicate claims for the same services to more than one health care plan without disclosing the duplicate coverage to each plan" (para. 25; Pet. App. 32a); by "prepar[ing] claims * * * [in] which he claimed to have performed" certain specified medical tests "[w]hen in truth and in fact these tests were not performed" (para. 27; Pet. App. 32a-33a); and by "submitt[ing] claims for payments for pregnancy tests that he claimed to have performed on women whom he knew had been sterilized" (para. 27; Pet. App. 33a). Each of Counts 2 through 31 then realleged these allegations and specified, by number and amount, a check that was mailed in furtherance of the fraudulent scheme (Pet. App. 35a-51a). Thus, as petitioner apparently now concedes, the indictment clearly alleged each of the elements of the offense of mail fraud.[2]

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[1]The only contention concerning the indictment made in petitioner's opening brief in the court of appeals was that "Count 1 states no federal offense." Pet. C.A. Br. 28 (footnote omitted).

[2]Count 1 alleged a fraudulent mailing but, apparently because of an oversight, did not identify the check. Petitioner challenged Count 1 on this ground in the court of appeals (see note 1, *supra*) but does not renew this contention in this Court.

Counts 32 through 40 alleged particular fraudulent claims (Pet. App. 52a-57a), and petitioner does not appear to assert that they are insufficiently specific; he raises this challenge only to the mail fraud counts of the indictment.

Petitioner nonetheless asserts that the indictment was inadequate because the checks specified in the indictment included payments for several claims, and the indictment, while alleging that each check included payment for at least one fraudulent claim, did not specify which of the claims was alleged to be fraudulent. Petitioner mingles together suggestions that the indictment thus failed to give him sufficient notice of the charges against him and therefore handicapped the preparation of his defense (*e.g.*, Pet. 10, 11, 13-14) with the conceptually distinct argument that the indictment violated the grand jury guarantee of the Fifth Amendment because petitioner might have been "convict[ed] on facts not found by, and perhaps not even presented to, the grand jury that indicted him" (Pet. 9-10). Neither argument merits review.

a. Petitioner's claim that the indictment did not give him adequate notice is in fact an attack not on the indictment but on the tactics of petitioner's trial counsel. If a defendant believes his indictment does not adequately specify the basis of the charges against him, he has an easily available remedy in the form of a bill of particulars. If he believes that, in view of the charges stated in the indictment, the prosecution's evidence has unfairly surprised him, he may seek a continuance. Petitioner's trial counsel did neither. As petitioner himself stated in his brief in the court of appeals, in the course of an attack on the competence of his trial counsel (Pet. C.A. Br. 7-8; footnotes omitted):

> Such additional specification as would be needed for the preparation of a defense—*i.e.*, which were the claim or claims alleged to have been fraudulent and in what respect or respects were they allegedly fraudulent—might have been furnished voluntarily by the prosecution and, if not, would undoubtedly have been ordered by the Court, had defendant's counsel sought a

> a bill of particulars under Fed. R. Crim. P. 7(f). However, no bill of particulars was requested, so that not until the prosecution presented its proof at trial did the defendant learn what he was charged with. Whether that disadvantage could have been remedied by requests for a continuance upon discovery of the nature of the alleged offenses is a purely academic question, for no such continuance was ever requested.

Thus, petitioner's trial counsel—whose competence is not now in issue and who was in the best position to assess the extent to which any lack of specificity in the indictment hampered the defense he intended to prepare—did not consider the indictment insufficiently specific or the defense unfairly surprised. Petitioner's quarrel, therefore, is not with the indictment but with trial counsel.

b. Petitioner's argument that he might have been convicted of an offense on which the grand jury did not indict him is precluded by *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). In *Miller*, this Court held that the grand jury guarantee of the Fifth Amendment is not violated if a defendant is convicted "for a criminal plan narrower than, but fully included within, the plan set forth in the indictment" (slip op. 8). Here, the proof at trial had the effect of making more specific, and thus narrowing—not broadening—the scheme described in the indictment. In other words, if the indictment in this case had alleged that every claim paid by every check specified in the indictment was fraudulent, *Miller* would dictate that petitioner—having been convicted, by sufficient evidence, of a narrower scheme—would be entitled to no relief. The fact that the indictment did not make such sweeping allegations—instead, it left petitioner free to inquire, by seeking a bill of particulars, precisely which claims were alleged to be fraudulent—is scarcely a circumstance of which petitioner can complain.

2. a. Petitioner also contends that the district court erroneously admitted hearsay evidence. The evidence in question consisted of statistical "peer group" studies that compared the number of tests per patient and per visit for which petitioner billed Medicaid and Blue Cross/Blue Shield with the billing practices of other physicians. Charles Halloran, a Medicaid auditor, and Barbara Crumpler, a Blue Cross/Blue Shield auditor, testified to the results of the studies. Halloran (but apparently not Crumpler) obtained the statistics concerning petitioner's "peer group" from another report. Both studies showed that petitioner billed for far more tests per patient and per visit than the average of the other physicians. See Pet. App. 5a; C.A. App. 254-255, 280-281; Pet. 18.

When Halloran began to testify about his study, petitioner's trial counsel objected, but not on hearsay grounds; he objected that the evidence was not sufficiently probative because petitioner's patients and medical practice might differ in significant ways from those of the physicians in the "peer group" with which he was being compared. The district court overruled the objection, stating that petitioner could seek to undermine the evidence on cross-examination. C.A. App. 254. On cross-examination, petitioner's trial counsel challenged the study on the ground that the peer group with which petitioner was compared included surgeons, who, counsel urged, are likely to perform fewer tests in their offices than gynecologists like petitioner. *Id.* at 270-271. The following exchange occurred (*ibid.*):

> Q. These other doctors that you examined, this peer group you are telling us about, Mr. Halloran, they were general surgeons, were they not?
>
> A. And OB/GNY.

Q. In general surgeons do a great deal of their testing in the hospital, don't they?

A. They don't do a great deal of testing.

Q. Well, why did you select them?

A. I didn't select them. This is a so-called management report that is generated every quarter for Medicaid and this was the peer group as set up by people other than myself. And I simply went and pulled those records.

Q. All right.

A. I can't explain why surgeons are in it any more than you can, sir.

Petitioner made the "[s]ame objection, for the record" (C.A. App. 280) to Crumpler's testimony, and it too was overruled. Petitioner did not cross-examine Crumpler about the way in which she compiled the statistics. After the trial, petitioner—represented by his current counsel—sought a new trial partly on the ground that the peer group studies were hearsay; the district court denied the motion, ruling that the studies were admissible and remarking that they "would seem harmless" in any event (*id.* at 1110). The court of appeals rejected petitioner's contention that the admission of the studies required reversal of his conviction on the ground that there was no showing that the trial court had abused its discretion (Pet. App. 5a n.6).

b. Petitioner's fact-bound contention plainly does not merit review by this Court. Because petitioner did not raise his hearsay objection at trial,[3] he is entitled to relief only if the admission of the evidence was plain error. See Fed. R. Crim. P. 52(b). As this Court has recently cautioned, the

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[3]The district court's ruling on the objection that petitioner did make was plainly correct.

plain error doctrine "authorizes the * * * correct[ion] only [of] 'particularly egregious errors,' *United States* v. *Frady*, 456 U.S. 152, 163 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' *United States* v. *Atkinson*, 297 U.S. [157,] 160 [1936]." *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14. This standard was manifestly not met in this case.[4]

Even assuming that petitioner is correct in characterizing the peer group studies as hearsay, their hearsay nature would have hampered efforts by defense counsel to question only the accuracy of the statistics themselves — that is, to show that in fact the doctors in the peer group with which petitioner was compared performed more tests than Halloran and Crumpler said they did. But neither petitioner's trial counsel nor his current counsel has shown any inclination to pursue such a line of attack. Rather, trial counsel attempted to show, and petitioner's current counsel contends (see, *e.g.*, Pet. 17-18), that it was meaningless to compare petitioner to the peer groups because his medical practice was so different.

The alleged hearsay nature of the evidence in no way impeded petitioner from making this showing. Once the reliability of the statistics showing the number of tests by the peer group is conceded — and even now petitioner does not suggest that he would challenge their reliability — it is immaterial whether the persons who compiled those statistics were available for cross-examination. The cross-examination of Halloran and Crumpler on the significance of the comparison between petitioner and the peer group was not

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[4]Petitioner now frames his contention as a claim under the Confrontation Clause. See, *e.g.*, Pet. i, 16, 19-20. But petitioner did not rely on the Confrontation Clause even in the court of appeals. See Pet. C.A. Br. 34-39.

in any way affected by whether they compiled the underlying statistics. That is the only line of cross-examination that petitioner's trial counsel attempted, and it is the only line of cross-examination that petitioner's current counsel suggests. See, *e.g.*, Pet. 18. Indeed, Halloran's testimony that he was unable to explain why surgeons were included in the peer group — testimony that petitioner cites as an example of how he was prejudiced by the admission of hearsay (see Pet. 17) — in fact demonstrates that trial counsel's cross-examination on this point was successful.

3. Finally, petitioner contends (Pet. 20-23) that the court of appeals erred by not ordering further proceedings—of a kind that petitioner only vaguely describes—on various discovery issues.

a. Petitioner made several discovery requests before trial. In response, the government allowed "open-file discovery" (Pet. App. 11a). After the trial, petitioner's new counsel learned of a survey of Blue Cross/Blue Shield subscribers for whom petitioner claimed to have performed services and moved for a new trial on the ground that this survey had been suppressed by the government.

At the hearing on the motion for a new trial, government counsel represented that the survey was among the "open file" documents made available to defense counsel prior to trial. The district court denied the motion. Pet. App. 12a & n.9. At oral argument, however, government counsel made a conflicting statement; and although the government corrected that statement in a post-argument memorandum, the court of appeals thought the matter sufficiently unclear to require a remand and a hearing before the district court on the question whether the survey materials were in the open file that was made available to defense counsel. Pet. App. 10a-16a.

Before determining to order these further proceedings, however, the court of appeals considered the government's contention that the survey documents were so immaterial that even a failure to disclose them would not have violated the government's obligations under *Brady* and *Agurs*. The court ruled that the documents were not so obviously immaterial as to render further proceedings concerning them pointless and left the question of materiality for the consideration of the district court on remand. Pet. App. 14a-15a.

b. Petitioner seizes upon the court of appeals' ruling on the government's contention to argue that "the government erred by using the wrong standard to evaluate whether evidence in its possession was exculpatory" and therefore subject to a duty of disclosure (Pet. 21 (footnote omitted)). But there is no showing that the government used *any* standard to withhold materials on the ground that they were not exculpatory. The court of appeals suggested that the survey documents, if they were not in the file, might have been in the hands of Blue Cross/Blue Shield (in which event the government would not ordinarily have an obligation to disclose them to defense counsel at all) or might have been withheld from the open file by agents who did not heed instructions to place all the documents in the open file. See Pet. App. 13a-14a. But the court did not suggest—and petitioner cites no evidence suggesting—that the government excluded the survey materials or any other documents from the file on the basis of an assessment of their exculpatory character. The mere fact that the government urged that the question whether the survey documents were in the file was immaterial because the documents were not sufficiently exculpatory, does not mean that the government "applied an * * * interpretation of *Brady* v. *Maryland*" (Pet. 23) in deciding which documents to place in the file in

the first place. The court of appeals manifestly considered the fact-bound discovery questions raised by petitioner's new counsel with great care, and there is no reason for this Court to second-guess its determinations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

JANIS KOCKRITZ
Attorney

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